(2003) 07 OHC CK 0020

In the Orissa High Court

Case No : Writ Petition (C) No''s. 4706 and 4720 of 2002

Orissa Small Scale Industries Association and Another and Orissa Young Entrepreneur association and Another — APPELLANT

Vs

State of Orissa and Others — RESPONDENT

Date of Decision : 04-07-2003

Acts Referred:

Constitution of India, 1950 — Article 226, 227
Orissa General Financial Rules, 1959 — Rule 9, 96

Citation : (2003) 96 CLT 364 : (2003) 2 OLR 334

Hon'ble Judges : B.P. Das, J;A.K. Patnaik, J

Bench : Division Bench

Advocate : S.P. Misra and S.P. Misra, S.K. Misra, S. Misra, S.S. Satapathy and M.R. Dash, for the Appellant; Sovesh Roy, Advocate General For O.P. Nos. 1 and 2, D.P. Sarangi, Senior Standing Counsel For O.P. No. 3 and D.P. Sarangi, Senior Standing Counsel For O.P. No. 2, C. Choudhury, B. Mohanty, D. Choudhury, S. Mohanty, S. Patnaik and Vijaya Shree For O.P. No. 7, S.K. Nayak, B. Bhanja, D. Nayak, B.K. Sahoo and M.S. Sahoo For O.P. No. 8, D.K. Mishra, K. Patnaik, G.K. Nayak, R. Mahalik and S.N. Mohapatra For O.P. No. 6, Ashok Mohanty, J. Sahu, H.K. Tripathy, M.K. Rout, J. Patra and S.P. Nayak For intervenor, N.K. Barik and S.C. Barik For intervenor, C. Choudhury, B. Mohanty, D. Chhotray, S. Mohanty, D.R. Das, Vijayashree and B. Moharana For O.P. No. 8, Akhil Mohapatra, R.C. Sahoo, J.M. Rout, A. Garanaik and B.P. Behera and S.K. Nayak (1), M. Bhuyan, D. Nayak, B.K. Nayak and M.S. Sahoo For O.P. No. 5, for the Respondent

Final Decision : Allowed

Judgement

A. K. Patnaik, J.—In these two writ petitions, the four associations, namely, Orissa Small Scale Industries Association, Utkal Chamber of Commerce and Industry Limited, Orissa Young Entrepreneurs Association and Orissa Assembly of Small and Medium Enterprisers have challenged the decision of the State Government in the School and Mass Education Department to place orders for purchase of compact Desk-cum-Bench (dual desk) with organisations other than those who are rate contract holders under the State Government. Their case in the writ petitions is that in the Industrial Policy Resolution, 2001 (for short, ''the I.P.R.'') of the Government of Orissa, it is clearly stipulated in paragraph 24.5 that the State Government Departments and agencies under the control of the State Government will purchase the rate contract items from the rate contract holder/ small scale industry at the price fixed without inviting tenders. Their further case in the writ petition is that in Appendix-6 of the Orissa General Financial Rules (for short, ''the O.G.F.R.'') Vol. II there is also a stipulation that in respect of items of Stores for which rate contract has been entered into by the Director of Export Promotion and Marketing, purchase of such items by all Departments of Government, Quasi-Government agency and State owned corporation should be only from sources with whom such rate contracts have been entered into. Hence, the Government could not have placed orders for purchase of dual desk with organizations other than rate contract holders contrary to the aforesaid stipulations in the I.P.R. 2001 and the O.G.F.R., Vol. II.

2. We called upon the State Government to produce before us the records in which the decision was taken to place orders of dual desk and we find from the said records that the State Level Purchase Committee in its meeting held on 31.8.2002 recommended that Dual Desks as per requirement are to be purchased from the Orissa Small Industries Corporation (for short ''the OSIC'') and the OSIC is to procure the items from small scale industries having EP & M rate and contract. The reasons for this recommendation is in paragraph 6 of the proceedings of the State Level Purchase Committee held on 31.8.2002 and are quoted herein below :

"6. The members were informed that as per (a) Rule 3 of Appendix- 6, O.G.F.R. Volume II the above store items are required to be purchased from the SSI units having rate contract approved by the Directorate of Export Promotion and marketing. The relevant provision of OGFR was read which states, "Except for the articles obtainable from firms on rate contract approved by the Director General of Supplies and Disposals, Government of India or Director of Export Promotion and Marketing Government of Orissa and from the Co-operative Agencies duly registered under Orissa Co-operative Societies Registration Act sealed tenders should be invited by giving wide publicity, for the purchase of articles value of which exceeds Rs. 50,000/- unless it is in the public interest not to call for tenders.

Detailed discussion was made on past experience. It was felt that it would be convenient for the administrative Department to procure the same through OSIC who in turn would procure from EP &n M rate contract holders.

OSIC being a Government undertaking, as per Rule 24.5 and 25 of Industrial Policy Resolution No. 26115 dated 3.12.2001 of Govt. of Orissa in Industries Department published in Extraordinary Orissa Gazette No. 26115 dated 3.12.2001 is technically in a better position to do the job. The relevant provision of IPR was read which states that State Govt. Department and Agencies under the contract of State Government will purchase rate contract items from the rate contract holder/small Scale Industry at the price fixed, without inviting tender. Industry at the price fixed, without inviting tender. In the instant case OSIC will act as consortium leader for all the SSI units".

It will be clear from the proceedings of the State Level Purchase Committee quoted above that it had considered the provisions of Appendix 6 of O.G.F.R., Vol. II and the I.P.R. and thereafter recommended that purchase of dual desk should be made from rate contract holders/small scale industry at the price fixed without inviting tender through the O.S.I.C. which was to act as consortium leader for all the S.S.I. units.

3. Mr. S. Roy, learned Advocate General submitted that the aforesaid recommendation of the State Level Purchase Committee headed by the Secretary, School and Mass Education Department, Government of Orissa was placed before the Minister, Education and the Minister after considering the fact that a huge quantity of materials was to be purchased within a short span of time took a decision on 26.9.2002 to place the orders with the O.S.I.C. and three other Apex Co-operative Societies, namely, Orissa Consumer Co-operative Federation, National consumer Co-operative Federation, and Tribal Development Co-operative Corporation at the rate of 45%, 20%, 20% and 15% respectively. He further submitted that this proportion of distribution of orders was determined after taking into consideration the capacity of all parties concerned on whom orders were to be placed so that there could be timely and efficient execution of the orders. In this regard, he further submitted that Government of India had placed some funds at the disposal of the State Government for the aforesaid purchases and was pressing hard to utilise the money by 31.3.2003 failing which the amount placed at the disposal of the Government of Orissa would lapse. According to Mr. Roy, learned Advocate General, the decision taken by the Government was, thus, in the public interest and there was absolutely no mala fide on the part of the Government while taking the said decision. He further submitted that there has been no violation of the O.G.F.R. Vol. II or the I.P.R. of the Government of Orissa.

Mr. Sarangi, learned Standing Counsel, School and Mass Education Department, Government of Orissa, produced before us the concerned file to show that on 23.6.2003 the Minister, School and Mass Education Department, Government of Orissa has indicated the reasons for the impugned decision of the Government to place orders with O.C.C.F., N.C.C.F. and T.D. C.C. at the rate of 20%, 20% and 15% respectively. We have perused the said reasons given by the Minister and the reasons are those which have been indicated by the learned Advocate General, Mr. S. Roy.

4. Mr. S. P. Mishra, learned counsel for the petitioner, on the other hand, submitted the when the I.P.R. and the O.G.F.R. Vol.II were clear that purchases of such items by all Departments of Government, Quasi-Government agency and State owned corporations are to be only made from sources with whom rate contracts have been entered into, there was clear violation of I.P.R. and the

O.G.F.R., Vol. II in placing a large part of the orders with organizations other than the rate contract holders/small scale industry.

5. Mr. Ashok Mohanty, learned Counsel appearing for intervener, on the other hand, referred to the provision of paragraph-24.5 of the I.P.R. and submitted that the said provision itself enables the State Government Departments to make purchases not only from rate contract holders but also from small scale industry at the price fixed through the NCCF, OCCF and TDCC. The aforesaid submission of Mr. Mohanty was supported by Mr. Shyamananda Mohapatra, learned counsel appearing for the N.C.C.F., Mr. A.K. Mohapatra, learned counsel appearing for the O.C.C.F and Mr. B. Mohanty, learned counsel appearing for the T. D. C. C. Mr. Shyamananda Mohapatra, further submitted that there is a provision in Rule 9 of Appendix-6 of the O.G.F.R., Vol. II to the effect that the Government may sanction departure from the rules in particular cases, where it can be shown that such departure is in the interest of the State.

6. Mr. S. K. Nayak, learned counsel appearing for the O.S.I.C. submitted that during the pendency of the writ petition whatever orders were placed with the O.S.I.C. have almost been executed by procuring the said materials from the small scale industry units and supplying the same to the department but the Government is yet to make payment towards the bills for such supply.

7. On a perusal of the I.P.R. of the Government, we find that provisions have been made therein for exclusive purchase from the industries located in the State and for purchase from rate contract holders/small scale industry in paragraphs 24.1. to 24.5 thereof. The said paragraphs are quoted herein below :

"PURCHASE FROM EXCLUSIVE LIST :

24.1 A list of store items reserved for exclusive purchase from industries located in the State would be prepared from time to time keeping in view the production capacity of the local industries and requirements of State Government departments and agencies under its control.

24.2 The state government departments and agencies will have to purchase their requirements of these items only from local industries with ISO/ISI/EPM certification for the items, by inviting competitive quotations from such industries. Efforts will be made to distribute the purchase order equitably among the participating industries, prepared to accept the lowest negotiated rate keeping in view their production capacity.

24.3 Local small-scale industrial units and khadi & village industrial units including handlooms and handicrafts will enjoy a price preference of 5% over local Medium or Large Industries.

Any local small scale industrial unit having ISO or ISI Certification for its products will get an additional price preference of 3% or 2% respectively.

RATE CONTRACT :

24.4 Rate contract in respect or specific store items not in the exclusive list and manufactured by the local small-scale industrial units will be finalized by the Director of Export Promotion & Marketing. This will be done on the basis of competitive offers received from local units, cost structure obtained from these offers, market price of similar items and other consideration relevant to fixing the price of the product. Besides in respect of bulk items a representative of the purchasing Department would be actively associated at the time of rate contract finalization.

Provided further that the State Government may review this policy from time to time and delete items included in the rate contact list and put it in the ''Exclusive list'' in the interest of encouraging competition.

24.5 State Government Departments and agencies under the control of the State Government will, purchase rate contract items, from the rate contract holder/ small scale industry at the price fixed without inviting tenders."

It will be clear from paragraph- 24.2 quoted above that the State Government Departments and agencies will have to purchase their requirements of items included in the exclusive list only from local industries with ISO/ISI/EPM certification by inviting competitive quotations from such industries. Whereas it will be clear from paragraph-24.5 that State Government Departments and agencies under the control of the State Government have to purchase rate contract items from the rate contract holders/small scale industry at the price fixed without inviting tenders. The scheme of the I.P.R. is that while in case of purchase of items in the exclusive list competitive quotations from small scale industries located in the state with ISO/ISI/EPM certification have to be invited, in the case of purchase from rate contract holders/small scale industry, no such competitive quotations are to be invited and the purchases have to be made at the price fixed without inviting tenders. Thus, the purchases of rate contract items and the purchases of exclusive items are to be made by two different procedures altogether. For this reason, we cannot accept the submission of Mr. Ashok Mohanty, Mr. Shyamananda Mohapatra, A. Mohapatra and Mr. B. Mohanty that paragraph 24.5 enables the State Government Departments and agencies under the control of the State Government to purchase items not only from the rate contract holders but also from small scale industry which is not a rate contract holder at the price fixed by the E.P. & M. In our view, the expression "rate contract" in paragraph 24.5 qualifies not only the holder but also the small scale industry and this would mean that under paragraph-24.5 purchase can be made by the State Government Departments and agencies under the State Government from a small scale industry holding the rate contract. This conclusion of ours is fortified by the provision in the proviso to paragraph-24.4 that the State Government may review the policy from time to time and delete items included in the rate contract list and put in the Exclusive list in the interest of encouraging competition. Hence, State Government Departments and agencies under the control of the State Government cannot place orders in respect of items included in the rate contract with a small scale industry which is not a rate contract holder unless and until the item is taken out from the rate contract list and put in the exclusive list under the proviso to paragraph-24.4 of the I.P.R.

8. Coming now to the O.G.F.R,, Vol.11, we find that in rule 96 thereof, it is stipulated that all purchases of stores for use in the public service should be regulated in strict conformity with the Store Rules given in Appendix-6. In Appendix-6, it is provided that:

"In respect of items of Stores for which rate contract has been entered into by the Director of Export Promotion and Marketing, purchases of such items by all Departments of Government, quasi-Government agency and State owned Corporation should be only from sources with whom such Rate Contracts have been entered into, by placing order in accordance with para 17 of the procedure outlined in Government of Orissa, Industries Department, Office Memorandum No. III-EMM-23/73, 128(120)/1 (EPM), dated 27.2.1973".

The aforesaid provision in the Appendix-6 clearly stipulates that in respect of items of stores for which rate contract has been entered into by the Director of Export Promotion and Marketing, purchase of such items by all Departments of Government, Quasi-Government agency and State owned corporations should be only from sources with whom such rate contracts have been entered into by placing orders in accordance with the paragraph-17 of the procedure outlined in Government of Orissa, Industries Department, Office Memorandum dated 27.3.1973. Thus, once an item is included in the rate contract list, the aforesaid provision in Appendix-6 casts an obligation on all departments of Government, Quasi-Government agency and State owned corporations to make the purchase of the said items "only from sources with whom such rate contracts have been entered into". Rule-9 of the said Appendix-6 of the O.G.F.R., Vol.II, however, provides :

"Government may sanction departure from the rules in particular cases, where it can be shown that such departure is in the interest of the State. Applications for sanction in such cases should be made to the Administrative Departments concerned who will issue the order after taking the advice of Commerce Department."

under the aforesaid Rule 9, Government may sanction a departure from the rules in particular cases, where it can be shown that such departure is in the interest of the State. There has to be, therefore, a complete application of mind by the State Government in a given case as to whether a departure is to be made from the aforesaid rules as quoted above for purchase of rate contract items by the Departments of Government, Quasi-Government agency and State owned corporations only from sources with whom rate contracts have been entered into.

9. It is perhaps for the aforesaid reasons that the State Level Purchase Committee in its meeting held on 31.8.2002 finally recommended for purchase of

the dual desk from rate contract holders through the O.S.I.C. and departed from its earlier recommendations for making the purchases from other organizations. If the Government was of the view that the rate contract holders did not have the capacity of manufacturing and supplying the entire quantity of dual desks that was required by the State Government, the State Government should have taken a conscious decision in accordance with the provisions of proviso to paragraph-24.4 of the I.P.R. 2001 and Rule-9 of Appendix-6 of the O.G.F.R., Vol.II. From the records produced before us we do not find that any such conscious decision has been taken by the Government either for deleting the item relating to dual desks from rate contract list and putting the same in the exclusive list or for making purchases in the larger public interest of the State under Rule-9 of the Appendix-6 of the O.G.F.R., Vol. II. The I.P.R. is for formulated with the approval of the State Cabinet and is the declared policy of the State Government and decisions taken by a Department should be consistent with such declared policy of the State Government and any departure from the same in the public interest can only be made by the State Cabinet or any authority so authorised by the State Cabinet in accordance with the relevant rules.

10. For the aforesaid reasons, the decision of the State Government for placing orders with the organizations other than the rate contract holders through the O.S.I.C. is quashed leaving it open to the Government to take such fresh decision in accordance with law as it considers deem fit and just keeping in view the observations in this judgment. Since we have now decided the dispute before us, the State Government will make payments of the bills for supply of dual desks already made by the O.S.I.C. to the State Government in terms of the purchase orders as expeditiously as possible so that the small scale industries which have made the supply through the O.S.I.C. do not suffer.

11. Both the writ petitions are accordingly allowed, but without costs.

B.P. Das, J.

I agree.

